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STATE OF CALIFORNIA

BUSINESS, TRANSPORTATION AND HOUSING AGENCY

DEPARTMENT OF CORPORATIONS

In the Matter of the Department of
Corporations of the State of California,

Complainant,

vs.

Science Based Nutrition, Inc.,

and

Van D. Merkle, D.C.,

Respondents.

**CONSENT ORDER AND RESOLUTION
OF CLAIMS**

The parties in the above-entitled proceeding hereby stipulate and agree to the entry of the following Consent Order and Resolution of Claims ("Consent Order") as resolution of the violations alleged by the State of California, Business, Transportation and Housing Agency, Department of Corporations ("State of California") pursuant to a Desist and Refrain Order issued against Science Based Nutrition, Inc. ("SBN") and Van D. Merkle, D.C. ("Dr. Merkle") on January 12, 2007:

A. Parties

1. Preston DuFauchard is the Commissioner of the California Department of Corporations. Mr. DuFauchard brought this action on behalf of the State of California in his official capacity. The State of California is represented in this matter by Sharon Lueras, Lead Corporations Counsel for the California Department of Corporations, Enforcement Division and

Erik Brunkal, Senior Counsel for the California Department of Corporations, Enforcement Division.

2. SBN is an Ohio Corporation engaged in the business of providing information to doctors and other health care professionals to assist them in using various forms of diagnostic testing with their patients to reveal nutritional deficiencies or tendencies toward disease. SBN's principal place of business is 5759 Far Hills Avenue, in Dayton, Ohio.

3. Dr. Merkle is the President of SBN and is a resident of Ohio.

B. Prior Order

1. On January 16, 2007, the State of California served a Desist and Refrain Order against SBN and Dr. Merkle ("Desist and Refrain Order").

2. The Desist and Refrain Order contained initial findings that SBN was offering and selling unregistered franchises in the State of California in violation of California Corporations Code §31110.

3. The Desist and Refrain Order was issued without a hearing pursuant to California Corporations Code § 31402 and stated that SBN and Dr. Merkle could challenge the Order by requesting an Administrative Hearing.

4. SBN and Dr. Merkle dispute the allegations and findings in the Desist and Refrain Order.

5. After subsequent discussions between the State of California, SBN, and Dr. Merkle, the parties have agreed to resolve this matter through this Consent Order rather than proceeding with an Administrative Hearing.

C. Order Prohibiting Potential Violations

1. As full and complete resolution of the State of California's concerns with respect to potential violations of the Franchise Investment Law of the California Corporations Code, §

31000, *et. seq.* ("California Franchise Code") by SBN and/or Dr. Merkle, the parties agree as follows:

2. SBN and Dr. Merkle agree that they will not offer or sell franchises in the State of California unless and until the offers have been duly registered under the California Franchise Code, or are exempt.

3. In the event that SBN and/or Dr. Merkle continue selling licenses and/or providing information to health care professionals in the State of California to assist them in performing diagnostic testing with their patients, the State of California agrees that adherence to all of the following restrictions will not be considered a violation of the California Franchise Code regardless of whether related SBN and/or Dr. Merkle register as a franchise:

a. SBN agrees that it will not list or provide contact information for its licensees on its own website.

b. SBN agrees that the terms of any future license agreements with licensees will not contain any authorization by the licensees to use the name "Science Based Nutrition" or any other logo of SBN. Attached as "Exhibit A" is copy of a revised license agreement containing terms that the State of California has determined will not constitute a violation of the California Franchise Code.

c. SBN agrees to make a written request within three (3) business days of the entry of this Consent Order to all current licensees requesting each licensee to cease use of the SBN trademarks and logos on all communications with patients, clients, and customers – including their own websites. SBN will bear no responsibility or liability for potential violations of the California Franchise Code with respect to whether individual licensees agree to comply with that request.

d. SBN agrees to revise all future materials provided to licensees so that none of the materials that are communicated to patients, clients and customers of the licensees will

contain any trademark or logo of SBN, with the limited exceptions noted below in Paragraph C-3-e.

e. SBN may authorize its licensees to use the Science Based Nutrition name and logos without being considered in violation of the California Franchise Code under the following circumstances:

1. SBN may continue to use the Science Based Nutrition name and logos in its communications to its licensees.
2. Licensees who have received the Science Based Nutrition training may receive a certificate that they have done so. SBN may continue to provide these certificates and the licensees will be allowed to display the certificates in their offices in their own discretion.
3. Licensees will be allowed to tell current and prospective patients that they have received nutrition and health services training from Science Based Nutrition, but will not do so in brochures or other advertising.

D. No Finding of Violation and Resolution of Claims

1. Upon agreement to the terms identified in this Consent Order, the State of California agrees that SBN and Dr. Merkle will not be considered in violation of the California Franchise Code for conduct with existing or potential licensees in the State of California that complies with the terms of this Consent Order.
2. The State of California further agrees that it will not seek any additional remedies, relief, or penalties of any sort against either SBN or Dr. Merkle through either further administrative proceedings or a court action based on potential prior violations of the California Corporations Code as identified in the Desist and Refrain Order. Such additional remedies, relief, or penalties that will not be pursued include but are not limited to: any further desist and refrain orders; any potential administrative citation; any claim for restitution or disgorgement or

damages on behalf of the previous, existing, or prospective licensees; any claim for civil or administrative penalties pursuant California Corporations Code §§ 31405-31406; any claim for attorney fees and/or investigation expenses; and any other form of statutory, common law, or equitable relief.

3. Neither this Consent Order, nor the original Desist and Refrain Order served on January 16, 2007, shall constitute evidence or admission by any party with respect to any issue of fact or law, including but not limited any potential prior violation of the California Franchise Code by SBN or Dr. Merkle prior to the adoption of this Consent Order.

E. Effective Date

This Consent Order is deemed effective May 15, 2007.

PRESTON DuFAUCHARD
California Corporations Commissioner

By: /S/
SHARON A. LUERAS
Lead Corporations Counsel
Enforcement Division

Entered and Agreed By:

| | |
|------------------------------|-------------------|
| SCIENCE BASED NUTRITION | DR. VAN D. MERKLE |
| By: <u>/S/ Van D. Merkle</u> | <u>/S/</u> |
| Its: <u>President</u> | |

LICENSE AGREEMENT

This License Agreement is entered and effective this ____ day of _____ 20____, by and between SCIENCE BASED NUTRITION, INC., an Ohio Corporation, located at 5759 Far Hills Avenue, Dayton, OH 45429 (hereinafter referred to as "Licensor") and [name]_____, [address]_____, [city, state, zip]_____, a health care provider duly authorized to provide health care services in the State of _____ (hereinafter referred to as "Licensee").

1. **OWNERSHIP:** Licensor is the owner of Science Based Nutrition (SBN) and MePro software, and reserves all rights of ownership therein to the exclusion of all other persons and entities, including Licensee. Licensee, during the term of this Agreement and any periods of renewal and for all times subsequent to the expiration of this Agreement, shall not utilize any information gained from this Agreement, and from the products and services provided to Licensee by Licensor pursuant to this Agreement, to create products or to provide services similar to those provided by Licensor, and shall not at any time now or in the future compete with Licensor in the provision of products and services to chiropractors or to any other health practitioners. Licensor acknowledges that Licensee previously purchased, or received a license to utilize, the following software, _____, to provide certain related services, which Licensor and Licensee agree Licensee shall have the right to continue to utilize without violating this License Agreement.

2. **PAYMENT, PERIOD OF LICENSE:** In exchange for payments made to Licensor by Licensee in accordance with the terms set forth in the attached schedule, Licensee, for a period of one (1) year from the date herein, Licensor shall from time to time as requested by Licensee, provide services and support by use of SBN and MePro software, shall provide consultation with Licensee, and shall provide reports and reports from any required laboratory to Licensee via secure or encrypted email (or by fax). **Your first renewal fee is \$_____ and is due one year from the date of this agreement.**

3. **DUTIES OF LICENSEE:** Licensee agrees that the products and services provided by Licensor pursuant to this Agreement enhances the Licensee's abilities to provide health care services, but does not replace them, and in no way alleviates the Licensee's duty to use due diligence in providing health care services to Licensee's patients or customers.

Licensee agrees to maintain current the authorization to provide health care services during the duration of this Agreement, including any renewal periods.

Licensee further agrees to restrict the use of the services and products provided to Licensee by Licensor to the provision of health care services by Licensee, shall use such services and procedures only in full compliance with applicable law, shall not permit the use of such services by any other health care practitioner, shall not resell such services, and shall not list any name other than the name of the Licensee on reports provided by Licensor as the attending health care provider of record of the appropriate patient or customer.

EXHIBIT

A

4. **CONFIDENTIALITY:** Licensors agree that all products and services provided to Licensee are protected by the patient-chiropractor privilege or the appropriate patient-health care provider privilege as recognized by law, and shall remain strictly confidential. Licensors shall neither utilize, sell, nor release to anyone or any entity other than Licensee the names or addresses of patients or customers of Licensee. Licensors shall not contact any patient or customer of Licensee directly in providing products and services pursuant to this Agreement, or for any other purpose, except as follows: 1) in a crisis situation of the patient, for the benefit of the patient, when Licensors are unable to contact the Licensee after reasonable attempts are made by Licensors; and 2) if the Licensee fails to list the name and other identifying information of the Licensee, in order to determine the name and other identifying information of the Licensee.

5. **NO RIGHT TO USE MARKS OR WEBSITE:** Neither this Agreement nor any other agreement between Licensors and Licensee authorizes the Licensee to use the name Science Based Nutrition or any other trademark, trade name, logo or other identifying symbol of Licensors (the "Licensors's Marks"), and neither Licensee nor anyone affiliated with Licensee shall use any of Licensors's Marks. Licensee shall not link its internet website, if any, to any website of Licensors. Notwithstanding the foregoing, nothing in this Agreement prohibits Licensee from telling Licensee's patients or clients that Licensee has received training in nutrition and health sciences from Licensors or displaying in Licensee's office a certificate, if any, received from Licensors to that effect, but Licensee may not use the Science Based Nutrition name or any other of Licensors's Marks (whether referring to such training or otherwise) in any advertising, promotional or marketing materials, brochure, telephone listings, media, signage, website or other public communication.

6. **DEFAULT BY LICENSEE:** If Licensee fails to abide by any of the terms of this Agreement, Licensors shall have all rights, privileges and remedies provided and available to Licensors as are provided by the laws of the State of Ohio and by federal law. No inaction by Licensors upon the failure of Licensee to abide by the terms of this Agreement shall be deemed a waiver by Licensors of Licensors's rights, privileges and remedies provided and available to Licensors as are provided by the laws of the State of Ohio and by federal law.

7. **TERMINATION OF AGREEMENT BY LICENSOR OR LICENSEE:** Licensee agrees that the failure to pay for the services and products in accordance with the terms of this Agreement and the schedule attached hereto, including any renewals, shall entitle Licensors to terminate this Agreement immediately. Licensee further agrees that the failure of Licensee to maintain the authorization to provide health care services in good standing, or to utilize the proper standard of health care services as required by the state in which Licensee is authorized to provide health care services, shall terminate all rights of Licensee under this Agreement.

If Licensors fails to provide the products or services required by this Agreement, Licensee may notify Licensors, in writing, that Licensee will terminate this Agreement thirty (30) days after receipt by Licensors of such notice, if Licensors is unable to provide the products or services required by this Agreement. If the failure to provide the products or services required by this Agreement is not corrected within thirty (30) days after receipt of such notice from Licensee, this Agreement may be terminated on such date by Licensee, subject to the following remaining obligations of Licensee to Licensors: 1) Licensee shall immediately return all copies of the

MePro software in Licensee's possession or control; 2) Licensee shall immediately pay to Licensor any and all fees to which Licensor is entitled, upon presentment of bills, invoices or statements to Licensee; 3) Licensee shall remain subject to all other provisions of this Agreement and the schedule attached hereto. Licensee specifically acknowledges and agrees that in the event of termination by Licensee, Licensee remains subject to all other provisions of this Agreement, except that from the date of termination, Licensee shall have no further right or permission to utilize the services or products of Licensor.

8. **DUTIES OF LICENSEE ON TERMINATION OF AGREEMENT:** In the event of termination by either party, cancellation, termination by completion of the period of this Agreement or any period of renewal or by lapse of time without renewal or further renewal, Licensee shall immediately discontinue the use of the products and services provided by Licensor, shall immediately return all copies of the MePro software in Licensee's possession or control, Licensee shall immediately pay to Licensor any and all fees to which Licensor is entitled, upon presentment of bills, invoices or statements to Licensee. Licensee shall further remain subject to all other provisions of this Agreement and the schedule attached hereto. Licensee specifically acknowledges that in the event of termination by Licensee or Licensor, Licensee remains subject to all other provisions of this Agreement, except that from the date of termination, Licensee shall have no further right or permission to utilize the services or products of Licensor.

9. **GOVERNING LAW:** This Agreement shall be exclusively governed by the laws of the State of Ohio. Any legal action related to this Agreement shall be brought solely in Montgomery County, Ohio, in a State or Federal Court located in such jurisdiction. This Agreement shall be binding upon and inure to the benefit of the Licensor and Licensee, their heirs and permitted assigns.

10. **ASSIGNABILITY:** This Agreement shall not be assignable by Licensee unless written permission is first obtained from Licensor.

11. **ENTIRE AGREEMENT AND UNDERSTANDING:** This Agreement contains the entire agreement between Licensor and Licensee, and represents their complete and entire understanding with respect to the subject matter of this Agreement.

12. **UNDERSTANDING OF AGREEMENT AND TERMS:** Licensee understands and agrees with all of the terms set forth in this Agreement, by executing this Agreement and paying Licensor the initial fees set forth in the attached schedule. Licensee understands and acknowledges that if Licensee breaches any of the terms of this Agreement, Licensor shall have the right, option and privilege to terminate the Agreement, and shall remain entitled to all damages to which Licensor may be entitled as set forth in this Agreement and under applicable Ohio and federal law. Licensee further agrees that if this Agreement is terminated for any reason, Licensee shall immediately pay to Licensor any and all fees to which Licensor is entitled, upon presentment of bills, invoices or statements to Licensee.

13. INDEMNIFICATION: Licensee agrees and shall indemnify and hold harmless Licensors from any and all losses, costs, expenses and damages, including attorney fees of Licensors, on account of any and all claims, demands, actions and proceedings that may be initiated against Licensors for any ground based upon any actions or inaction of Licensee, including but not limited to acts or inaction which constitute violations of any copyright, proprietary right of any person or entity, state and federal regulations, or any other acts or inaction.

14. NO WARRANTIES: Licensee acknowledges that Licensors makes absolutely no warranties whatsoever, express or implied, with regard to any and all products and services provided by Licensors to Licensee under the terms of this Agreement. As a result, Licensee agrees that Licensors shall not be liable to Licensee for any claims or damages, which may be suffered by Licensee from the use of such products and services.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, and in consideration of the covenants and agreements contained herein, do hereby execute this Agreement, with each party warranting their ability to enter into this Agreement for the person or entity herein named as a party hereto.

Dated: _____

Licensee Business Name: _____

Licensee name [print]: _____

Licensee Signature: _____

Licensors: SCIENCE BASED NUTRITION, INC.

By: _____

Van D. Merkle, President

SCIENCE BASED NUTRITION™ SUPPLY ORDER FORM

Name _____ Date _____

Address _____

City _____ State _____ Zip _____

Phone _____ Fax _____ Email _____

Payment Type: CASH \$ _____ CHECK # _____ CC (MC V AX Dis Debit)

Account # _____ Exp _____ V code _____

Signature _____

Initial Access Fee

\$3300.00 = _____

[\$ _____ annual renewal fee is due one year from this date]

OR

Leasing Option available through NCMIC. Cost per month for 24 months = \$258.00. The leasing option includes a 10pk of Merkle Blood Panels, 10pk of hair tests, 1 box of urinalysis strips, 10 stool kits and the access fee. You are still responsible for your annual renewal fee due 12 months from the date of sign up. This offer is subject to approval by NCMIC. Please see SBN Staff member for credit application.

Blood Tests [only for SBN doctors]

1 Merkle Panel blood test

\$179.30 x # _____ = _____

5 Merkle Panels @ \$176.00 each

\$880.00 x # _____ = _____

10 Merkle Panels @ \$158.00 each

\$1580.00 x # _____ = _____

Hair Tests [only for SBN doctors]

1 Doctor's Data Hair Analysis test

\$48.00 x # _____ = _____

5 Doctor's Data Hair tests @ \$45.00 each

\$225.00 x # _____ = _____

10 Doctor's Data Hair tests @ \$42.00 each

\$420.00 x # _____ = _____

DMSA [only for SBN doctors]

DMSA Test Kit (supplement not included)

\$60.00 x # _____ = _____

(initial DMSA Test will require 2 kits pre and post)

Extra Testing Supplies [only for SBN doctors]

Urinalysis Strips (quantity 100)

\$71.00 x # _____ = _____

Stool Sample Tests

\$6.00 x # _____ = _____

Media

SBN Session 1 on DVD

\$180.00 x # _____ = _____

SBN Session 2 on DVD

\$180.00 x # _____ = _____

SBN Session 3 on DVD

\$180.00 x # _____ = _____

Any Two Sessions on DVD **\$50.00 Savings!**

\$310.00 x # _____ = _____

All Three Sessions on DVD **\$75.00 Savings!**

\$465.00 x # _____ = _____

Diabetes lecture on DVD

\$20.00 x # _____ = _____

Consultation DVD

\$16.00 x # _____ = _____

Dr. Merkle's Radio Show A

Fluoride, breast cancer, whooping cough, pravachol, splenda

\$10.00 x # _____ = _____

Dr. Merkle's Radio Show B

Prostate cancer, hypothyroid, polymyalgia, rheumatism

\$10.00 x # _____ = _____

TOTAL _____

FOR OFFICE USE ONLY

| | | |
|----------------|----------------|------------------|
| Blood Tests | received _____ | to be sent _____ |
| Hair Tests | received _____ | to be sent _____ |
| Urinalysis | received _____ | to be sent _____ |
| Stool Kits | received _____ | to be sent _____ |
| Diabetes | received _____ | to be sent _____ |
| DMSA | received _____ | to be sent _____ |
| Training DVD's | received _____ | to be sent _____ |

| | | |
|--------------|----------------|------------------|
| SBN 1 | received _____ | to be sent _____ |
| SBN 2 | received _____ | to be sent _____ |
| SBN 3 | received _____ | to be sent _____ |
| Radio A | received _____ | to be sent _____ |
| Radio B | received _____ | to be sent _____ |
| Consultation | received _____ | to be sent _____ |

If signing up for a license agreement, please fill out #1 thru #5

1. WHAT DO YOU WANT ON YOUR REPORT LETTERHEAD? [circle all that apply**]

Office Name Doctor's Name Credentials Address Phone Fax Email

If any information is different from the last page please list

**A doctor's name has to be on every report. If you are in a situation where you have a multiple doctor practice and you would like each doctor to have their own reports, please see an SBN representative for instructions.

2. DESIGNATE A USERNAME AND PASSWORD. *These are case sensitive*

Username:

Password (please include both #'s and letters):

3. SELECT A VITAMIN LIST FOR YOUR REPORTS. Please only choose one.

If you want more than one vitamin list, please speak to an SBN representative.

☐ Anabolic Laboratories

☐ Garden of Life

☐ Basic Vitamins/ Nutrients

☐ Metagenics

☐ Bk2health [Vitamins used by Dr.
Merkle]

☐ No Vitamin List

☐ Nutri-West

☐ Douglas Laboratories/Amni

☐ OrthoMolecular

4. I signed the contract and gave it to an SBN representative. ☐Yes ☐No***

***If you selected "No", please see an SBN representative for your contract.

CREDIT CARD TO KEEP ON FILE WITH SBN

Due to security issues, we are required to obtain the following information before we can apply your credit card payments.

CC# _____
Exp. Date: _____ Verification Code: _____
Circle the type of credit card: Am Exp Visa MC Disc

Please print your Name as it appears on the card and billing address. Make sure that it matches the credit card company's records exactly.

Name: _____
Address: _____
City: _____ State: _____
Zip: _____

Please write the phone number that the credit card company has for this credit card.
Phone: _____

I authorize Science Based Nutrition to use this credit card to apply charges for products and services ordered by me or my office staff from Science Based Nutrition. I understand that I can tell Science Based Nutrition to stop applying charges to this credit card at any time.

Signature _____
Date: _____

REQUEST FOR PREAUTHORIZED PAYMENT PLAN

I hereby authorize Science Based Nutrition® to assign a financial institution to draw items (Visa, MasterCard, American Express, or Discover) for the purpose of paying said payments on the account of (please fill out the top portion of this form):

NAME (as shown on the account) _____

Subject to the following conditions:

- 1. This authorization is to remain in full force and effect until Science Based Nutrition has received full payment of the fore-written access fee.*
- 2. The privilege of making payments under this plan may be revoked by Science Based Nutrition if any item is not paid upon presentation.*
- 3. This plan is non-refundable, and in no event will release you from your obligation.*
- 4. A service Charge of \$20.00 will be assessed to all insufficient charge cards. It is your obligation to contact our office with a new billing form if you change credit information.*
- 5. This plan shall apply to the following applicant:*

Customer Signature _____ Date _____

6. According to the website, future seminars are scheduled in San Francisco and Los Angeles later in 2007.

7. At these seminars, chiropractors (and a few other alternative medicine practitioners) are offered franchises allowing them to dispense Science Based Nutrition Products and services, as well as the use of Science Based Nutrition logos and trademarks. Franchise fees of \$3,300 (cash) or \$3,500 (financed) are charged for the initial year with recurring fees of \$300 annually. The structure of the contract between Science Based Nutrition (franchisor) and the health care professional (franchisee) falls within the parameters of California Corporations Code 30000 et. seq. (The Franchise Investment Law).

8. Science Based Nutrition's website lists at least 50 franchisees in California currently authorized to distribute Science Based Nutrition, Inc.'s products and services.

Based upon the foregoing findings, the California Corporations Commissioner is of the opinion that Van D. Merkle, D.C. and Science Based Nutrition, Inc. offered and/or sold franchises and are continuing to offer and sell franchises in California that were subject to registration under the Franchise Investment Law without the offers and/or sales first being registered, in violation of Corporations Code section 31110. Pursuant to section 31402 of the Corporations Code, Van D. Merkle, D.C. and Science Based Nutrition, Inc. are hereby ordered to **desist and refrain** from the further offer or sale of Science Based Nutrition, Inc. franchises unless and until the offers have been duly registered under the Franchise Investment Law, or are exempt.

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1 This Order is necessary, in the public interest, for the protection of investors and franchisees
2 and consistent with the purposes, policies and provisions of the Franchise Investment Law.

3 Dated: January 12, 2007
4 Sacramento, California

5 PRESTON DuFAUCHARD
6 California Corporations Commissioner

7
8 By: _____
9 SHARON A. LUERAS
10 Lead Corporations Counsel
11 Enforcement Division